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CHARLES ELMORE CROPLEY

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1935. NOS. 767 AND 768.

DUPLATE CORPORATION and PITTSBURGH PLATE GLASS COMPANY, Petitioners,

v.

TRIPLEX SAFETY GLASS COMPANY OF NORTH AMERICA, Respondent.

## PETITIONERS' REPLY BRIEF.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

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## PETITIONER'S REPLY BRIEF.

Some of the assertions in the respondent's brief force us to file this reply, much to our regret. If we undertook to discuss all of the respondent's assertions which we believe to be incorrect, it would amount to restating the positions taken in our original brief. This we shall not do. The respondent's criticism of the authorities cited by the petitioners requires no answer.

**Good faith.** As stated in our principal brief (p. 6), the good faith of the petitioners (hereinafter referred to as the defendants) in manufacturing and selling the product which was ultimately held to be an infringing article has been independently sustained by the Master, by the District Court (speaking by the same judge who tried the infringement issue) and by the Circuit Court of Appeals. Notwithstanding, the respondent (hereinafter referred to as the plaintiff) contends at page 46 of its brief that there is no evidence to support the findings of good faith and concludes its argument at page 48 by asserting that these findings "will always remain a mystery in this case unless this Court sees fit to brush aside the veil." Such unsupported assertions seem hardly sufficient to overcome the findings of the

Master and the two lower courts, but if this Court is interested in reading evidence which supports the finding of good faith, we respectfully refer to the testimony of Mr. Bradley (R. 653-661), patent counsel of the defendants, who examined the process in question and advised that it did not infringe.

Clearly Mr. Bradley had an adequate opportunity to form an honest opinion, as his testimony shows. He devoted his entire time to patent affairs of the Pittsburgh Plate Glass Company and was a patent attorney of long experience (R. 653). He was in close touch with the officials of Duplate Corporation (then known as Pittsburgh Safety Glass Co.) and advised them on several occasions (R. 654). He knew of the research work of the Pittsburgh Plate Glass Company and that it had been going on for a long time, and he undertook his own study in November and December, 1927 (R. 654), which was before infringement (Finding No. 1, R. 827). He made a thorough study of all patent literature on the subject (R. 655). He consulted with the attorneys of Dupont Viscoloid Company (which owned fifty per cent. of the stock of Duplate Corporation) early in 1928 and had the benefit of collaboration with consulting engineers of Pittsburgh Plate Glass Company and the patent attorney for the Dupont organization (R. 657). As a result of this investigation the defendants were so certain that their operation involved no infringement that they invited officials of the plaintiff to inspect the complete operation, which invitation was accepted (Bradley, R. 660; plaintiff's vice president, Edwards, Infringement Record, R. 58; plaintiff's president, Haskell, Infringement Record, R. 61). The record on the infringement, as distinguished from the accounting, aspect of this case has been filed with the clerk of the Court as an original exhibit, pursuant to stipulation (R. 909).

Mr. Bradley was influenced by three separate lines of reasoning: (a) The first eleven claims of the patent (which is shown at page 175 of the aforementioned infringement record) called for the use of a dehydrating agent for the removal of moisture from the gelatin, which the patent designated as an adhesive. The twelfth claim (the one in suit) called for gelatin "substantially free from contained moisture, **as described**" (black face type ours). Mr. Bradley believed (R. 655-656, 658-659), until the lower court ruled otherwise, that the quoted language referred to gelatin which had been dehydrated by a chemical agent, such as alcohol. **This was a rational construction of the patent, because ten of its preceding claims called for a "volatile, hygroscopic liquid", and the third claim specifically spoke of "ethyl alcohol" as a dehydrating agent.** (b) Mr. Bradley believed (R. 655, 658-659), as did the defendants' research department, that the gelatin as used by the defendants contained much more moisture than the ten (10) to thirteen (13) per cent. found in commercial gelatin (plaintiff's witness, Morgan, at R. 39 of the Infringement Record, aforementioned). Defendants' research department performed many experiments to determine the percentage of moisture in the gelatin after it dried, and testimony concerning that research was given to the District Court (Infringement Record, aforementioned, R. 27-28, 68-120). It was undisputed that the gelatin solution was originally ninety-seven (97) per cent. water (Infringement Record, Sherts, R. 27 and plaintiff's witness, Morgan, R. 37). The difficult nature of these experiments to determine the ultimate moisture content is apparent when we realize that the research department was weighing a sheet of glass covered with a gelatin film one-ten-thousandth of an inch thick (Infringement Record, Sherts, R. 28, 29 and plaintiff's witness, Morgan, R. 45) for the purpose of de-

termining the percentage of evaporation in the gelatin. While the lower courts ultimately held in the infringement suit that the cementing gelatin used by the defendants had practically the same moisture content as that used by the plaintiff, it was not held or even intimated that there was anything but an honest difference of opinion in the matter. Quite the contrary, as evidenced by the later holdings of good faith (District Court, R. 873; Circuit Court of Appeals, R. 912). (c) Mr. Bradley's only false reliance was on the fact that **a company known as Safetee Glass Company had been using a process, on which that of the defendants was patterned, for ten years or more without objection from the plaintiff** (Bradley, R. 656). It is in the record (R. 656) that the plaintiff's suit subsequently brought against the Safetee Glass Company in November, 1930, was dismissed because of laches: *Triplex Safety Glass Company of North America v. Kolb,* 53 F. (2d) 1062, 1064-1065 (E. D., Pa., 1931, opinion by Judge Kirkpatrick).

Plaintiff asserts at page 3 of its brief that the defendants disregarded the advice of their patent counsel by using heat (an air dryer) to dry the gelatin. The fact is that the defendants did not disregard the advice of their patent counsel. As to the use and purpose of the air dryer, it was the uncontradicted testimony in the infringement trial (Sherts, Infringement Record, R. 30) that:

> "This dryer is used less than thirty per cent. of the time; we use it in the morning when the conveyor is cold, or during a very cold day before the room is warmed up. The purpose of using the dryer is to dry up the superfluous moisture which gathers in globules on the top of the gelatin, and which would tend to make a smear when the

products is assembled, or would rub off certain areas." (black face type ours).

Plaintiff asserts at page 18 of its brief that Duplate Corporation "was formed for the express purpose of infringing this patent." The real story behind the organization of this corporation refutes the assertion. By the fall of 1927, developments in the pyralin industry and particularly newly-discovered means of protecting pyralin against discoloration, led the Pittsburgh Plate Glass Company to believe that the principal manufacturing obstacle was in a fair way to being overcome (Higgins, R. 689-690). Later manufacturing difficulties, particularly edge separation, were not foreseen (Higgins, R. 691; Clause, R. 256). The Pittsburgh Plate Glass Company had an experienced glass-manufacturing organization and valuable contacts with the automobile industry, while Dupont Viscoloid Company was a large and efficient manufacturer of pyralin. Both companies had made many developments of their own on various phases of the laminated glass business, and the research departments of both organizations had experimented with laminated glass for years (Higgins, R. 690-691; Bradley, R. 654). The Dupont Viscoloid Company felt that the time was ripe to go into the laminated glass business, either with the Pittsburgh Plate Glass Company or alone (Higgins, R. 690). In that perfectly legitimate state of mind and **before manufacturing operations were started** (Bradley, R. 654; Master's Report, R. 827-828), both companies turned to their patent counsel for advice.

One is left with the inference at page 6 of plaintiff's brief that the defendants' operating losses are proof of "an inordinate haste to rush into the laminated glass business" and, therefore, of bad faith. The real explanation lies in the fact that the process of lami-

nation looked perfectly simple before one got into it (Clause, R. 256). Neither experience in the manufacture of plate glass or pyralin revealed the complications that would result from attempting to adhere the two articles into a sheet of laminated glass. There had been no comparable large scale operation. No one could foresee these difficulties or the long period of trial and error required to develop a fit process and product (Master's Report, R. 804-807; District Court, Opinion, R. 874-875; Sherts, R. 316-321, 325-361, 394-414; Clause, 255-257, 261-287). Nor should one lose sight of the fact that in dealing with the automobile industry one is under obligation to make deliveries on schedule, difficult or wasteful as that may be, in view of the other manufacturing commitments of the automobile industry with which such deliveries must synchronize (Clause, R. 255).

It is apparently claimed that the defendants willfully infringed the plaintiff's patent in order to seize a market for laminated glass already established by the plaintiff (Respondent's Brief, pp. 3, 48). But the Master has found (R. 823), on the basis of undisputed testimony which he carefully reviewed (R. 821-823) that there was not a substantial demand for laminated glass at any time during the accounting period, much less prior to that time.

It is apparently argued at pages 3-4, 19 and 48 of plaintiff's brief that defendants' price policy was dictated by a desire to keep laminated glass business from the plaintiff. In reality it was directed at a recalcitrant automobile market and the necessity of getting one or more manufacturers to use laminated glass as standard equipment (Master's Report, R. 821-823, 826; Higgins, R. 623; Fisher, R. 446-447; Petitioner's Brief, pp. 47-51, 61).

**Wastage.** The plaintiff induced the Circuit Court of Appeals to believe that the Master had held that the entire sum of $1,477,364.84 represented rejects and returns of defective laminated glass, that is, a finished product which turned out to be defective. As a matter of fact, the Master found to the contrary, as demonstrated in our principal brief (pp. 19-20). Concerning this wastage item, we submit, with deference, that the Circuit Court of Appeals committed two errors: first, in interpreting the Master's Report to mean that the entire item of $1,477,364.84 represents finished laminated glass; second, in disallowing this item on any theory. Plaintiff asserts (Brief, p. 8) that it was the duty of the defendants to show how much of this item represented finished defective laminated glass and how much was lost in the process before a finished article was reached. It is also claimed at page 7 of the plaintiff's brief that "There is not a scintilla of evidence in the record by which this segregation may be made, except in so far as it has been conceded by the plaintiff." Both assertions are plainly erroneous, but, in any event, the defendants have supplied this proof in Exhibit "O" (R. 1045).

Exhibit "O" was accepted by the Master in its entirety with the single exception that the plate glass wastage was computed at the bare manufacturing cost rather than at market value (R. 844 A). The Master did not separate the items of loss for product found to be defective **before** it reached the finished form from the items of loss for product found to be defective **after** it reached finished form. The records of defendant as to factory operating losses are full and complete (Master's Report, R. 808), and this separation could easily have been made by the Master. He did not make it because, in his judgment and properly so, defects in manufacture constituted wast-

age, whether the defects were discovered before or after the articles reached finished form, if the resulting losses therefrom "were unavoidably concomitant with the manufacture of the good finished product" (Master's Report, R. 808-809). The separation in question can be made from Exhibit "O", which sets forth the details of defendants' losses, month by month, **separately for each department** in feetage and in dollars, with the labor items included in the cost figure set opposite the Duplate feetage. This permits exactly the segregation which plaintiff now asserts is impossible. In demonstration of this fact: All of the losses set forth in Exhibit "O", except those under the heading "Loss in Finished Stock" or "Finished Stock Loss" are losses which necessarily occurred **prior to the completion of a laminated glass product** and, by computation, constitute about ninety-four per cent. of the defendants' factory operating losses as listed in that exhibit. The total losses as therein shown amount to $1,662,637.49, of which only $102,560.29, or approximately six per cent., constituted loss on finished product. The items in Exhibit "O" aggregating this amount have been segregated and listed in Schedule 1 attached to this brief. The losses set forth in Exhibit "O," when adjusted to reflect merely the bare manufacturing cost, as distinguished from the market price, of plate glass, came to $538,019.87 for factory wastage exclusive of plate glass, and $435,207.52 for the plate glass in such wastage (Petitioners' Brief, pp. 15-16), aggregating $973,227.39. The same percentage above mentioned (six (6) percent.) applies to the items of $538,019.87 and $435,207.52 making up this total. Customers' returns of laminated glass found by them to be defective are not included in Exhibit "O", but form separate items (Master's Report, R. 844 A - 844 B). Plaintiff asserts on page 8 of its brief that throughout this liti-

gation everyone has treated this item of wastage as representing "completely fabricated but defective laminated glass". This assertion is plainly erroneous. The item was never so treated by anyone in the litigation until the plaintiff induced the Circuit Court of Appeals to place this erroneous interpretation upon the Master's Report. Assuredly the Master had no such thought (R. 804-807). Plaintiff's contention to the contrary puts it **in the indefensible position of arguing that a factory making a composite structure out of sheets of material so fragile as plate glass sustained no operating losses except in finished product.** We respectfully submit that every dollar of the item of $1,477,364.84 was improperly rejected by the Circuit Court of Appeals.

We have pointed out at page 22 of our original brief that in our opinion the Circuit Court of Appeals erred in disallowing the item of $219,036.93 for pyralin losses.

We submit that *Westinghouse Elec. & Mfg. Co. v Wagner Mfg. Co.*, 225 U. S. 604, cited at page 8 of plaintiff's brief, has no bearing on the issue of wastage. In the *Westinghouse* case the Master found (p. 616) that the defendant infringer had netted $132,000 of profits from the sale of the infringing transformers. The defendant infringer then offered evidence to show that it had made non-infringing and valuable improvements to the infringing article which had contributed to the profits. This court held that plaintiff, having shown that defendants obtained profits from the infringement and it further appearing that the defendant had commingled and confused the parts composing the profits, the burden was on the defendant to show what the proper divisions of the profits should be and, if it was impossible to make an apportionment thereof, then all of the profits should go to the plaintiff. In the opinion of this court it is said

(p. 622): "But such burden is not imposed by law; nor is it so shifted until after the plaintiff has proved the existence of profits attributable to his invention and demonstrated that they are impossible of accurate or approximate apportionment." In the *Westinghouse* case the profits were ascertained and found by the Master and **the question was how they should be divided. In the case at bar the question is whether there were any profits and what are proper cost items to deduct in determining that question.** There is no question here of commingling or confusing the various parts (some patented and some unpatented) of an invention or of the profits therefrom, as there was in the *Westinghouse* case.

**Plate glass accounting.** The assertion in the brief for the respondent (p. 18) that there was no market for one-eighth-inch plate glass in the automobile industry overlooks the fact that the use of one-eighth-inch plate glass in automobiles displaced the one-quarter-inch glass which the Pittsburgh Plate Glass Company was theretofore selling and that one-eighth-inch plate glass had a well-established market at and prior to the period of infringement (Petitioners' Brief, pp. 34-35; see Respondent's Brief, p. 10).

Plaintiff asserts (Brief, p. 22) that if the rule of the *Barber* case is applied, the Pittsburgh Plate Glass Company will be permitted to retain for itself a profit of $2,465,600.41 and refers to the schedule attached to the Master's Report in support of this. The Master finds nothing of the kind and it is not the fact. On the contrary the Master found that the defendants operated at a net loss of $276,857.47 on the basis of putting one-eighth-inch plate glass into the account at cost (Findings Nos. 5 and 19; Conclusion No. 2; R. 828, 830).

Plaintiff makes the further assertion (Brief, p. 19) that it was the infringers' preconceived plan to charge

a large profit for the raw material and then to sell the complete infringement at or below cost. It is rather hard to reconcile the assertion with the fact that the raw material was sold to Duplate Corporation at ten per cent. below the prevailing market price (Petitioners' Brief, p. 33).

**Damages.** Plaintiff makes repeated reference (Brief, pp. 3, 5, 41) to its original investment of $2,800,000 in the laminated glass business. The interjection of the companion assertion that this investment was lost (Brief, pp. 3, 5, 41) and that the plaintiff sold out at forced sale (Brief, p. 41) is without justification in the record. As to its justification in fact, we cannot know, for the plaintiff was successful in keeping its books and records out of this case (Petitioners' Brief, pp. 67-68). How much of this so-called investment went to the promoters for their patents or good will, how much was expended for promotional services or invested in a plant at Hoboken which the plaintiff abandoned in the spring of 1928 (Haskell, R. 151) could doubtless have been developed had the defendants been permitted to make an examination of the plaintiff's books. The price at which the plaintiff sold its business could also have been determined.

Plaintiff speaks (Brief, pp. 3, 41) of an advertising expenditure of $15,000,000 by the Ford Motor Company, as if it were advertising of plaintiff's glass; whereas, in fact, it was the **Ford car** rather than any particular feature of the car that was being advertised (Master's Report, R. 825). Plaintiff, of course, did receive the benefit of any advertising value arising from the fact that its laminated glass was being used in the car. We have shown in our principal brief (pp. 48, 64-65) that the unfortunate experience of the Ford Motor Company with the plaintiff's laminated glass not only deprived the plaintiff of any advertising value in this contract, but

was also a serious detriment to the laminated glass business.

Plaintiff asserts (Brief, p. 40) that defendants' counsel have garbled the sense of Section 4921 of the Revised Statutes. There has been no garbling. The pertinent portion of Section 4921 is correctly set forth on page 68 of the petitioner's brief both in words and in meaning, and there is no abuse of the asterisks indicating omissions. The entire Section, in so far as it concerns patent accounting, is set forth at page 76.

Plaintiff charges (Brief, p. 40) that defendants' counsel disclose "a rather amazing misconception of the law." The law is a large subject. Candor compels us to admit that on occasion we have misconceived it. But we think that this is not one of those occasions. Our statement that brought this rebuke upon us was that legislative recognition of general damages was first accorded in 1922.

**Interest.** The decisions of this Court cited by the plaintiff (Brief, p. 45) in support of the principle that interest is a discretionary matter are inapplicable to the instant case. *Bates v. Dresser,* 251 U. S. 524, 531, simply sustained, as an exercise of discretion, a partial allowance of interest dating from the decree of the District Court. In the instant case interest was allowed for a period of three and one-half years **prior to the Master's Report.** *Miller v. Robertson,* 266 U. S. 243, 258, was an action for a breach of contract where "the elements necessary to a calculation . . . were known or ascertainable" from the date of the breach. The case at bar is an **unliquidated tort action.**

Respectfully submitted,

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## SCHEDULE 1.

Exhibit "O" shows the following factory operating losses (including plate glass) under the heading "Loss in Finished Stock" or its equivalent:

| Page | Month | | Duplate feet | Amount |
|---|---|---|---|---|
| | January- | | | |
| 6 | July, | 1928 | 21527 | $39,798.41 |
| 11 | Nov. | 1928 | 742–9 | 1,366.44 |
| 12 | Dec., | 1928 | 133 | 238.58 |
| 13 | Jan., | 1929 | 3326 | 5,966.84 |
| 13 | Feb., | 1929 | 1149 | 2,118.97 |
| 14 | April, | 1929 | 641 | 1,222.45 |
| 16 | May, | 1929 | 352 | 621.03 |
| 17 | May, | 1929 | 2362 | 3,526.18 |
| 18 | June, | 1929 | 1343 | 1,782.55 |
| 19 | July, | 1929 | 2000 | 2,429.48 |
| 20 | August, | 1929 | 17177 | 21,986.90 |
| 20 | August, | 1929 | .... | 314.98 |
| 21 | Sept., | 1929 | 405 | 551.48 |
| 22 | Oct., | 1929 | 576 | 744.99 |
| 23 | Nov., | 1929 | 3450 | 4,683.03 |
| 24 | Dec., | 1929 | 9442 | 13,835.93 |
| 25 | Jan., | 1930 | 286 | 375.43 |
| 26 | Feb., | 1930 | 4 | 5.29 |
| 27 | March | | 57 | 75.30 |
| 28 | April | | 48 | 63.06 |
| 29 | May | | 683 | 852.97 |
| | Total | | 65,703–9 | $102,560.29 |